IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 00-5213

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICROSOFT CORPORATION,
Defendant-Appellant.

STATE OF NEW YORK *ex rel.*
ELIOT SPITZER, *et al.*,
Plaintiffs-Appellees,

v.

MICROSOFT CORPORATION,
Defendant-Appellant.

JOINT REPLY OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF THEIR MOTIONS FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

The Software & Information Industry Association (SIIA) and the Computer & Communications Industry Association (CCIA) submit this joint reply to Microsoft's renewed effort to govern the flow of argument in this Court. Having failed in its first effort to limit public participation in the most important antitrust case of this generation, Microsoft again seeks to invoke the power of this Court to suppress competing viewpoints.

Microsoft is not satisfied with the 250 pages of briefing it will present this Court through its own briefs and those of supporting *amici*. Although Microsoft consented to the participation of both SIIA and CCIA in the Supreme Court, Microsoft asks *this* Court to bar all participation in this case

by any *amicus* that is not both in agreement with it and under its control. In the alternative, Microsoft asks the Court to confine the rest of the Nation — the business community in general, the software industry, software users (including CCIA member companies), and academics — to a single 25-page brief.

To impose such a limit at this stage would frustrate this Court's effort to gather information necessary to render a wise decision in this case. This Court already has recognized the extraordinary importance of this case. In a case of this magnitude and complexity, the limitation on *amicus* participation that Microsoft seeks would guarantee the sort of diluted and inadequately explained brief that inevitably results from compromises among parties of diverse interests and viewpoints, making it significantly less likely that this Court would be aided by the brief. This Court properly declined Microsoft's earlier request to silence the public in advance, and should do so again. Although the amici will make every effort to coordinate and streamline their presentations to this Court, the Court should not artificially limit public participation in the case at this stage.

1. Microsoft's response to the *amicus* motions reflects its consistent position throughout this case with respect to those members of the business community that do not accept Microsoft's yoke. Microsoft brands as the captive of Microsoft's competitors any organization that disagrees with Microsoft on antitrust issues.[1/] Microsoft has successfully chilled comment on its activities by many independent companies and groups.

[1/] Of course, any organization whose members include software companies is likely to include competitors of Microsoft in some market. Some software companies avoid competing with Microsoft only by choosing to become Microsoft's vassals, making what Microsoft allows them to make and steering clear of product development that might threaten a Microsoft product or initiative. As the evidence in this case makes clear, Microsoft expects such deference from other industry participants. *See, e.g.*, *United States* v. *Microsoft Corp.*, 84 F. Supp.2d 9, 30-43 (D.D.C. 1999) (Findings of Fact, ¶¶ 79-132).

Not all organizations have capitulated, however. CCIA and SIIA are established, broad-based trade associations with long-standing policies favoring competition. Both groups have demonstrated interests and prior records of involvement in this case, and their members have shown a substantial financial commitment to their policy positions.

SIIA represents a broad cross-section of software developers and content providers. Some of those firms compete with Microsoft, but many do not. As SIIA pointed out in its motion (at 2), SIIA was designated by the United States as its supporting *amicus curiae* at the liability stage in the district court. At that time, Microsoft was a member of the SIIA. SIIA has more than 1,000 members, who elect its board of directors. As a consequence, that board, which comprises representatives of diverse companies, is not easily dominated or intimidated by a single member, even one of Microsoft's size and market power. The elected board of SIIA decided, over Microsoft's opposition, that it was in the interest of competition in the software industry to accept the government's invitation. After SIIA filed its brief in support of the United States, Microsoft withdrew from the organization and induced others to withdraw funding. When Microsoft claims that a trade group is "dominated by Microsoft's competitors" (Response at 4), Microsoft simply means that it could not dissuade the group from criticizing Microsoft.

Microsoft's effort to pigeonhole CCIA as being "dominated by Microsoft's competitors" is also absurd. CCIA includes several software vendors, but also includes large users of software products (Microsoft's and others), and thus presents a spectrum of vendor and user perspectives. CCIA's members include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunications and on-line services, resellers, systems integrators, and third-party vendors. Most CCIA members are customers of, suppliers to, or partners with Microsoft, or have no direct relationship with Microsoft. CCIA has long believed that the interests of the

computer and communications industries coincide with the interests of consumers. CCIA's involvement in Microsoft antitrust issues dates from its participation as an *amicus curiae* in the original consent decree case both in the district court and in this Court. Indeed, this Court acknowledged the validity of some of CCIA's concerns about the narrowness of the original consent decree. See *United States* v. *Microsoft*, 56 F.3d 1448, 1461-1462 (D.C. Cir. 1995).

3. Microsoft complains (Response 4) that our prior briefs have not only provided legal arguments resting on the controlling antitrust decisions of the Supreme Court, but also have supplied additional context relevant to the industry and to Microsoft's assertions. A few observations may illuminate the source of Microsoft's apprehension at our continued participation in this case. First, our participation and legal arguments have demonstrated that the antitrust laws can and should be applied to ensure competition in the software and Internet industry, and that we resist efforts to create what for practical purposes would amount to a "software exception" to those laws. Second, our prior briefs have used *Microsoft's own public statements* to illustrate the broader significance of the anticompetitive conduct in this case, by illuminating Microsoft's efforts to expand the Windows monopoly to suppress competition in additional software markets while preventing threats to the monopoly itself. Third, although Microsoft has labeled our submission to the Supreme Court of the United States as "scurrilous," *Microsoft* v. *United States*, No. 00-139, Reply Br. 10 n. 8, it could not say that anything in our brief was *untrue*, for the good reason that the great bulk of the "newspaper articles" that Microsoft hopes never come to the attention of this Court quote the public statements of Microsoft's executives — often in speeches released by Microsoft itself. It is understandable that Microsoft hopes to preserve its ability to assert one position in its briefs while asserting the opposite to financial and market analysts and the trade press. In making critical determinations about the application of the antitrust laws to one of the Nation's most important

industries, however, this Court should be fully aware both of market realities and of Microsoft's practical assessment of those realities.

4. CCIA and SIIA represent very different sets of companies, with only a few that overlap, and have distinctly different areas of expertise. These groups have cooperated in two previous briefs in this case, however, and expect to do so again in this Court. The perspective of their diverse memberships does differ, though, from the views of the parties and of other prospective *amici* in the case.

SIIA and CCIA have focused on the application of antitrust law in the specific context of the software industry and the Internet — the particular questions that arise from the nature of software code and of markets defined by the uses of such code. SIIA and CCIA also have devoted substantial attention to issues of remedy, both the practicalities known to them through experience and the implications deriving from the Supreme Court's precedents. Their perspective differs in important respects from that of the plaintiffs.

The perspective of SIIA and CCIA also differs from that of other prospective *amici* with some prior involvement in competitive issues relating to Microsoft. The Project to Promote Competition has presented the views of Judge Robert Bork — who independently appeared below as an *amicus* supporting the plaintiff States — views that have focused on preserving the continuity of antitrust doctrine as it is applied to the software markets at issue in this case. By contrast, AOL's interest is unique. Having acquired Netscape, AOL is the private party most directly affected by the conduct at issue in this case. AOL's separate and substantial interest should not detract from the participation of the broader constituency represented by SIIA and CCIA.[2/]

[2/] It would appear that Professor Hollaar offers the technical expertise that this Court earlier indicated it might find useful. It is ironic that Microsoft seeks to bar the courthouse door to a

5. Microsoft's desire to regulate argument presented to this Court is remarkable. Not only does it ask the Court to exclude the views of all *amici* favoring competitive software markets, but also to exclude from participation those *amici* who support Microsoft's position but are not securely within Microsoft's control. Microsoft contends that the only view beyond those of the parties that the Court should entertain is the brief of two organizations that Microsoft has directly sponsored. That brief would be submitted by the "Association for Competitive Technology," a group created and funded by Microsoft for the purpose of opposing law enforcement in this case, see, *e.g.*, Charles Cooper, *Microsoft's Best Friend in Washington*, ZDNet News, 1998 WL 28812898 (July 30, 1998); James Grimaldi, *Microsoft's Lobbying Largess Pays Off*, Wash. Post, May 17, 2000, at A1, and the Computing Technology Industry Association, a group of retailers whose sudden interest in this case apparently derives from a recent and significant special contribution submitted by Microsoft. Microsoft's resistance to the participation of the Association for Objective Law and the Center for the Moral Defense of Capitalism is telling. Microsoft plainly fears any voice it does not control.

All *amici* should coordinate and consolidate their presentations as much as possible. In a case of this importance, however, Microsoft should not be permitted to silence its opponents or to choose its friends.

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professor of computer science at one of the leading institutions in that field, when this Court has made clear its need for technical expertise. See Notice, Oct. 18, 2000 (proposing "review session on the fundamentals of automation").

CONCLUSION

For the foregoing reasons, as well as those stated in our Motions, the Motions of CCIA and SIIA for Leave to File Briefs as *Amici Curiae* should be granted.

Dated: October 31, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2000, I caused a true and correct copy of the foregoing Joint Reply of the Software & Information Industry Association and the Computer & Communications Industry Association in Support of their Motions for Leave to Participate as *Amici Curiae* in Support of Plaintiffs to be served by hand and by facsimile upon:

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